FORM NLRB-4477
(2-85)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTEENTH REGION

Shawnee, Oklahoma

WOLVERINE TUBE, INC.

Employer

and

Case 17-RD-1697

ROBERT F. JOHNSON

Petitioner

and

ARKANSAS REGIONAL COUNCIL OF CARPENTERS

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record 1/ in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 2/

3. The labor organization*(s)* involved claim*(s)* to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9*(b)* of the Act: 3/

All full-time and regular part-time maintenance employees, including millwrights, electricians, machinists, blade filers, pin grinders, tool crib employees, draftsmen, utility employees and relief supervisors employed by the Employer at its Shawnee, Oklahoma facility, but EXCLUDING production employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit*(s)* found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees

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engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

ARKANSAS REGIONAL COUNCIL OF CARPENTERS

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc**., 156 NLRB 1236 *(1966)*; **N.L.R.B.** v. **Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge of the Subregion who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Region 17 Office, 8600 Farley – Suite 100, Overland Park, Kansas 66212-4677 on or before on or before **September 14, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **September 21, 2004**.

Dated September 7, 2004

/s/ D. Michael McConnell

at Overland Park, Kansas

Regional Director, Region 17

1/ Following the hearing, the Employer filed a motion to strike the Union's brief because, contrary to the Board's rules, it was sent by facsimile transmission to the Regional Office and was not served on the Employer or its counsel. The Employer further contends that the Union, in its brief, mischaracterized the record evidence and attached an alleged Layoff and Recall policy that was never introduced into evidence or presented at the hearing. Finally, the Employer states that, in the event that the Regional Director decides to consider the alleged Layoff and Recall policy attached to the Union's brief, the Region should reopen the record.

The Employer correctly points out that the Board's rules prohibit the filing of briefs by facsimile transmission, and that the Union neglected to serve it or its counsel. However, in view of my decision in this case, I find that any consideration by this office of the Union's brief was not prejudicial to the Employer. Further, I note that the alleged Layoff and Recall policy attached to the brief was not considered in reaching the decision in this case. Therefore, I shall deny the Employer's motion.

2/ Wolverine Tube, Inc. (the Employer) is a Delaware corporation engaged in the manufacture of copper tubing at its Shawnee, Oklahoma facility.

3/ On May 7, 2003, the Arkansas Regional Council of Carpenters (the Union) was certified to represent the maintenance employees employed by the Employer at its facility in the following unit:

> All full-time and regular part-time maintenance employees, including millwrights, electricians, machinists, blade filers, pin grinders, tool crib employees, draftsmen, utility employees and relief supervisors employed by the Employer at its Shawnee, Oklahoma facility, but EXCLUDING production employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

On June 16, 2004, Robert F. Johnson (the Petitioner) filed the instant decertification petition seeking an election to determine whether the maintenance employees wish to continue to have the Union as their collective-bargaining representative.

THE ISSUES AND DETERMINATION

The parties stipulated that the Petitioner, who serves as a relief supervisor, as well as other relief supervisors, are properly included in the unit, and are eligible to vote in the election. This finding is consistent with the March 19, 2003, Decision and Direction of Election in Case 17-RC-12161, in which the Regional Director found that relief supervisors were eligible voters, because they did not possess sufficient supervisory indicia to exclude them from the maintenance unit. I take administrative notice of that Decision, approve the parties' stipulation, and will include the relief supervisors in the appropriate unit. The parties further stipulated that draftsman James Stay should be included in the unit as an eligible voter, and that machinist trainees Morris Wyant, Lugrand and Winger had a reasonable expectation of recall to their unit positions and should be included in the unit. Based on the parties' representations and stipulations, as well as the Decision in Case 17-RC-12161 concerning inclusion of draftsmen in the appropriate unit, I will include Stay, Wyant, Lugrand, and Winger in the appropriate unit.

The parties agree that the only issue in the instant case is whether employees Lynda Lupton and Michelle Dauman, who were tool crib employees until their layoff and transfer into production positions in October 2003, have a reasonable expectation of recall to their unit positions, thereby rendering them eligible to vote. The Employer contends that Lupton and Dauman were laid off from the maintenance unit and transferred into production jobs in October 2003, that it does not plan to return Lupton and Dauman to their tool crib jobs, and

that they should not be allowed to vote in the election because they have no reasonable expectation of recall. Contrary to the Employer, the Union asserts that Lupton and Dauman should be included in the appropriate unit, because when they were removed from their unit positions, it was with the understanding that they would be returned to those positions, and they therefore have a reasonable expectation of recall to the maintenance unit.

Based on the record as a whole, and for the reasons set forth below, I find that there is insufficient evidence to support the contention that Lupton and Dauman have a reasonable expectation of recall to their full-time unit positions, and I therefore conclude that they are not eligible voters on that basis. As a result, Dauman is not eligible to vote in the election. However, it appears that Lupton does perform work in the position of tool crib employee when unit employees are on vacation. Because the record evidence is insufficient to determine the number of hours that Lupton has worked as a tool crib employee during a recent, representative time period, I am unable to determine whether Lupton is a regular part-time employee in the maintenance unit. I will, therefore, allow her to cast a challenged ballot.

THE FACTS

The Employer's tool crib employees were found to be eligible voters in the Decision and Direction of Election issued in Case 17-CA-12161 on March 19, 2003. In October 2003, two of the four tool room employees, Lupton and Dauman, were laid off or transferred from their positions in the tool room. The Employer assigned Lupton and Dauman to positions in production on the size and burr machine. Lupton currently works on the 2nd shift and Dauman works on the 3rd shift.

Lupton testified that at the time she was laid off or transferred from her tool crib job and reassigned to production work, she was told by Production Manager Hamilton that the tool crib jobs were being cut in half because of economic reasons. Hamilton told Lupton that he did not anticipate that the layoff or reassignment would last very long, but if she was on the production floor for 6 months or longer, her wages would be dropped to the level of her production job. Lupton and Dauman have both been out of their tool crib maintenance jobs for longer than 6 months.

Union bargaining committee witnesses Jim Griffith and Greg Ward testified that Union representatives asked the Employer during a negotiating session how long the employees laid off or transferred from the maintenance unit, and who were placed in production jobs, would stay in those production jobs. Griffith testified that the Employer never gave a length of time that the maintenance employees would remain in production. Ward testified that Perry Bingham, the Employer's Maintenance Superintendent, called the unit employees' moves to production "temporary," but gave no time frame for their return, other than that the employees would have the opportunity to return when economic conditions got better.

The Employer's Production Manager Billy Hamilton testified that the tool crib has been operating effectively since October 2003 with only two tool crib employees, Cathy Tibbets and Sandra Moore, and that this staffing level has been sufficient during a time when production levels have exceeded full capacity. Hamilton testified that not only have Tibbets and Moore been able to cover the duties of the tool crib, but that those tool crib duties have been covered effectively, despite the fact that most of Tibbets' time has been spent performing purchasing duties, rather than performing the tool crib duties of receiving and dispersing tools and equipment.

Finally, the Employer's witness Billy Hamilton testified that, based on the Employer's interpretation of the recently enacted "Sarbanes-Oxley Act of 2002" (Sarbanes-Oxley Act), the purchasing duties now performed by Tibbets will be removed and reassigned to a buyer, thus freeing Tibbets to perform other crib room duties. Hamilton testified that assigning both purchasing and dispersing duties to the same individual has been deemed by the Employer to be inappropriate under the Sarbanes-Oxley Act. Additionally, Hamilton testified that the cycle inventory functions now performed by Tibbets and Moore will be reassigned to another employee, based on the Employer's belief that the Employer might violate the Sarbanes-Oxley Act, by having employees who disperse materials also perform the inventory functions. Hamilton testified that this decision and reallocation of duties will allow Tibbets and Moore to spend more time performing historic tool crib duties, and will further diminish any possibility that Dauman and Lupton will be needed in their former unit positions.

ANALYSIS

The legal standard for assessment of whether laid-off or reassigned employees are eligible to vote is clear. Thus, voting eligibility depends on whether objective factors support a reasonable expectation of recall in the relatively near future. The Board considers several factors in determining voter eligibility, including the Employer's past experience and future plans, the circumstances surrounding the layoff or reassignment, and what the employees were told about the likelihood of recall. Apex Paper Box Co., 302 NLRB 67, 68 (1991). There is no evidence of past layoff experience at the Shawnee facility that would aid in making the determination in the instant case. A history of seasonal or cyclical layoffs might support a conclusion that laid-off employees had a reasonable expectation of recall. See Sol-Jack Co., 286 NLRB 1173, 1174 (1987). However, the absence of a prior policy of recalling

laid-off or reassigned employees does not prove that such employees did not have a reasonable expectation of recall.

The record is clear that the Employer does not plan to return Lupton and Dauman to their former positions as full-time tool crib employees. The Employer presented evidence that it has been effectively operating its tool crib with two full-time tool crib employees, one of whom currently spends the majority of her time performing purchasing functions. Additionally, the number of overtime hours worked by those two employees, in the face of increased production, does not support a need to return Lupton and Dauman to the tool crib. See Sol-Jack Co., supra at 1174. Tool crib employee Cathy Tibbets worked 304 hours of overtime in the last 9 ½ month period, or approximately 8 hours per week of overtime. The other full-time tool crib employee, Sandra Moore, during the same time worked 120 hours of overtime, or approximately 2 ½ hours of overtime a week. These minimal overtime numbers do not support a finding that either Lupton or Dauman have a reasonable expectation that they will be recalled to the tool crib, because of a need for manpower in the tool crib, especially where the evidence shows that the tool crib is operating at more than full manufacturing capacity, with only two tool crib employees.

Additionally, the evidence shows that the Employer is planning to realign certain of the functions of its tool crib employees to comply with the recently enacted Sarbanes-Oxley Act, which will allow the current tool crib employees to focus on the duties of dispersing tools and equipment, rather than purchasing and inventory. This change will reallocate the purchasing functions Tibbets currently performs to a new buyer. Further, changes necessitated by the Sarbanes-Oxley Act will remove the cycle inventory responsibilities from the tool crib employees. The changes planned for the duties of the current tool crib employees will free up

a significant number of tool crib employee hours, thereby enabling the current employees to spend even more time performing the traditional duties of dispersing tools and equipment, and further lessening the need to return Lupton and Dauman to their unit jobs. This change in the nature of the Employer's business further indicates that Lupton and Dauman do not have a reasonable expectation of recall to their former positions in the tool crib.

When objective factors involved indicate that a laid-off or reassigned employee has no reasonable expectation of recall, vague statements by the Employer about the chance or possibility of the employee being recalled will not overcome the totality of the evidence to the contrary. See, Sol-Jack Co., supra at 1173-1174; S & G Concrete Co., 274 NLRB 895, 897 (1985); Foam Fabricators, 273 NLRB 511, 512 (1984); Tomadur, Inc., 196 NLRB 706, 707 (1972). In the instant case, the other objective factors, such as the absence of a prior history of layoffs or reassignments, the Employer's ability to staff the department with its current employees, and the Employer's future plans to reallocate functions so that the current employees will be spending more hours performing duties that are historically tool crib functions, outweigh any vague statements indicating that Lupton or Dauman might eventually be returned to their unit positions when economic conditions improve. Such statements are more likely to be uttered to put an optimistic spin on the situation for the laid-off employees than to express a reasonable assessment of a return to work. See, Sol-Jack Co., supra at 1174. As a result, I do not find that the statements attributed to the Employer's representatives by Lupton, Griffith, and Ward concerning the possibility that Lupton and Dauman might return to their positions in the tool crib, support a finding of reasonable expectation of recall.

Although I have found that Lupton does not have a reasonable expectation of recall to her full time position as a tool crib employee, evidence was adduced at the hearing showing that

Lupton fills in for the tool crib employees when they are on vacation. The evidence shows that Lupton works in the tool crib as much as once a month, but neither Lupton nor Production Manager Billy Hamilton was able to provide specific evidence regarding the number of hours Lupton has worked in the tool crib since her reassignment. Thus, the issue raised is whether Lupton is a regular part-time maintenance employee as set forth in the unit description. In order to qualify as a regular part-time employee, Lupton must perform work with sufficient regularity to establish that she shares a community of interest with the other employees in the bargaining unit. Pat's Blue Ribbons, 286 NLRB 918 (1987). The Board has attempted to apply eligibility formulas that promote employee enfranchisement, without including employees who have no real continuing interest in the unit's terms and conditions of employment. DIC Entertainment, L.P., 328 NLRB 660 (1999); Trump Taj Mahal Casino Resort, 306 NLRB 294, 296 (1992). The most widely-used formula to determine whether there is sufficient regularity of employment to include employees in the unit is the test set forth in Davison-Paxon, 185 NLRB 21 (1970), which held that an employee who regularly averages 4 or more hours of work per week during the last quarter prior to the eligibility date is eligible to vote. There is no evidence in the record about the number of hours that Lupton has worked as a tool crib employee during the last quarter. However, because it appears that Lupton has worked in the tool crib after her reassignment, and in order to protect her right to cast a ballot if she has performed unit work with sufficient regularity to warrant her inclusion in the unit, I will allow her to cast a challenged ballot.